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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1385

GARY ALLEN MAY,
Petitioner,

vs.

STATE OF INDIANA,
Respondent

FROM THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States violated when the trial court allowed into evidence, over objection of the defendant, contraband seized under the "plain view" doctrine?

STATEMENT OF THE CASE

The petitioner, Gary Allen May, was convicted in the Allen Superior Court of Allen County, Indiana, of posses-

sion of marijuana in violation of I.C. 1971, 35-24.1-2-4(d)(10). On July 5, 1977, the Third District of the Indiana Court of Appeals affirmed the conviction, *May v. State*, — Ind. App. —, 364 N.E.2d 172 (1977) [Petitioner's Brief, Appendix A].

Defendant's Petition for Rehearing was denied on August 12, 1977, and the Indiana Supreme Court denied Appellant's Petition to Transfer on December 5, 1977.

STATEMENT OF THE FACTS

On July 30, 1974, the date of May's arrest, Charles B. Meeks, a Senior Detective Sergeant of Allen County was investigating information he had received concerning a place frequented by juveniles with regard to two missing young women. Officer Meeks testified that he went to the residence at 5710 East Dupont Road, in Fort Wayne, Indiana, in hopes that he could link the information received about a gathering place for youths with his search for the whereabouts of the two young women.

At approximately 10:30 P.M., Officer Meeks, with another officer, drove by the residence observing a man and woman building a fire in the yard. The officers turned around and drove past the house a second time, then came back and drove into the end of the driveway. Several other cars were parked on the lawn in front of the house. Officer Meeks got out of the car and started to walk on the pavement to the front door. May came from inside the house and intercepted Officer Meeks who had begun to identify himself. As May gave him a shove, saying, "Get the hell out", Officer Meeks observed in the house, through the lighted window approximately eight feet away, a set of scales and marijuana in bricks and loose on a picnic table. Together the two police officers then went into the residence and proceeded to arrest all of those present. At trial, May made

a motion to suppress the evidence seized from the premises during the arrest.

ARGUMENT

May contends that the police officers' entrance into his home to seize the marijuana constituted an unreasonable search and seizure in violation of his Fourth Amendment rights. Petitioner maintains that Officer Meeks was intruding upon constitutionally protected property without justification when he observed the contraband through the window. Further, May argues that even though the marijuana was in plain view, a search warrant was still required under the facts of this case prior to seizure of the evidence.

Indiana case law is clear that the warrantless seizure of evidence is permissible if it was within the "plain view" of the arresting officer. *Lindsey v. State*, 246 Ind. 431, 204 N.E.2d 357 (1965); *Brown v. State* (1959), 239 Ind. 358, 157 N.E.2d 174; *Johnson v. State*, — Ind. App. —, 325 N.E.2d 859 (1975). However, this court has held that the "plain view doctrine" is applicable only if the seizing police officer "had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused". *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971).

May does not dispute the lower court's finding that the evidence was in plain view, but bases his attack on the proposition that the Officer failed to justify his initial intrusion as having "some other legitimate reason for being present unconnected with a search directed against the accused." *Coolidge*, at 466 of 403 U.S., at 2038 of 91 S.Ct.

The record shows that Officer Meeks was pursuing an investigation concerning the whereabouts of two young

women who had been reported missing. The Officer was not pursuing a narcotics investigation, nor was he involved in a search directed against the defendant. Meeks was simply attempting to verify a tip that the missing juveniles were seen at the house. The officer's presence was in no way different from that of any other person who might solicit the occupant of a residence for information by knocking on his front door. It was only after having observed contraband through the window that the nature of Officer Meeks' mission changed.

In *Alcorn v. State,* 255 Ind. 491, 265 N.E.2d 413 (1970), the Indiana Supreme Court quoted from *Marshall v. United States*, 422 F2d 185 (5th Cir. 1970), at 496 of 255 Ind., at 416 of 265 N.E.2d:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest." *Haerr v. United States*, 240 F2d 533, 535 (5th Cir. 1957).

State's evidence established that Officer Meeks walked up to the front door of the May residence with some questions concerning the two sisters. He was not seeking evidence to use against May. Several cars were parked on the lawn, and a couple was building a fire in the yard with the primary light in the area coming from the front window next to the door. May did not stop Meeks until the point at which the officer viewed the marijuana strewn over the picnic table. In this context, Meeks' inquiry was not a search; the evidence was in plain view and was observed by an officer rightfully in a position to have such a view. *Johnson v. State, supra; Alcorn v. State, supra; United States v. Hanahan*, 442 F2d 649 (7th Cir. 1971). Once the contraband fell into Officer Meeks' "plain view", it was subject to seizure and properly admissible in evidence.

Brown v. State, supra; Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

The Court of Appeals for the Ninth Circuit in *Davis v. United States*, 327 F2d 301 (1964) expressly held that investigation was a sufficiently legitimate purpose to justify walking up to the door of a private home.

> "Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law." at 303 of 327 F2d.

Petitioner attempts to distinguish *Davis* from the present case by arguing that the holding in *Davis* hinged on the time of day that the officer approached the defendant's residence. However, a further reading of the case discloses that the court did not consider the time of day when deciding the opinion:

> "It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light (citations omitted) . . . . if, without a search and without an unlawful entry into the premises, a contraband article . . . is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it." at 305 of 327 F2d.

Marshall v. United States, 422 F2d 185 at 189 (5th Cir. 1970) similarly held:

> "Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset."

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully requests that this court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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